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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

**No. 283**

WESLEY GREENE,

*Petitioner,*

*vs.*

THE ART INSTITUTE OF CHICAGO, AN ILLINOIS CORPORATION NOT FOR PROFIT, AND THE NORTHERN TRUST COMPANY, A CORPORATION, TRUSTEE AND EXECUTOR OF THE ESTATE OF BENJAMIN F. FERGUSON, DECEASED,

*Respondents.*

## BRIEF OF RESPONDENT, THE NORTHERN TRUST COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## BRIEF OF RESPONDENT, THE NORTHERN TRUST COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### JURISDICTION.

Petitioner seeks review in this Court under the provisions of 28 U. S. C. § 1257(3). Respondent, The Northern Trust Company, asserts that this Court has no jurisdiction to grant such review, because (a) the decision below did not depend upon the determination of a federal question, and (b) any possible federal question raised by petitioner's complaint was waived by petitioner, under the laws of the State of Illinois, when petitioner failed to appeal directly to the Supreme Court of Illinois, as is required under the laws of Illinois in all cases where constitutional questions are involved.

## QUESTIONS PRESENTED.

1. Will this Court review a decision of a State Court when it appears from the record that the decision of the State Court is adequately supported by independent grounds which do not involve the determination of a federal question?

2. Has petitioner, having waived all constitutional questions by appealing in the first instance to the Appellate Court of Illinois, rather than to the Supreme Court of Illinois, any standing to seek certiorari in this Court?

## STATEMENT.

Petitioner's Statement fails to disclose adequately the special and limited position of respondent The Northern Trust Company, as Trustee under the will of Benjamin F. Ferguson. The only duty imposed upon The Northern Trust Company, as Trustee under Mr. Ferguson's will, was to pay the *income* from the trust estate to The Art Institute of Chicago (Abst. 3). The Northern Trust Company, as Trustee, has paid the income from the trust estate to The Art Institute of Chicago, and has preserved the principal of the trust estate intact. There is no controversy over these facts. This case is concerned only with the use of the income fund which has been accumulated by The Art Institute of Chicago, known as the B. F. Ferguson Monument Fund. Under Mr. Ferguson's will, The Northern Trust Company, as Trustee, had no power or duty with respect to the income from the Ferguson estate except to pay it over to The Art Institute of Chicago, which it did.

Respondents moved the Superior Court to strike and dismiss the complaint on the grounds, *inter alia*, that petitioner did not have legal capacity to sue; that the cause was barred by a prior judgment; and that the complaint did not

allege facts sufficient to state a cause of action (Abst. 5; Addl. Abst. 20). In addition to these motions, The Northern Trust Company moved to dismiss the complaint for failure to allege any facts showing any misconduct of any kind on the part of The Northern Trust Company, as Trustee, or any instance or particular in which said Trustee failed in any manner to perform its full duties as Trustee under the Will of Benjamin F. Ferguson, deceased (Abst. 11).

Petitioner's complaint was dismissed by the Superior Court of Cook County, Illinois, "on the separate motions of the defendants to dismiss the suit." The Appellate Court of Illinois in its opinion affirming this order of the Superior Court, did not discuss the special position of The Northern Trust Company, as Trustee.

## ARGUMENT.

### I.

**THE DECISION BELOW IS ADEQUATELY SUPPORTED BY INDEPENDENT GROUNDS WHICH DO NOT INVOLVE THE DETERMINATION OF A FEDERAL QUESTION, SO THAT NO QUESTION IS PRESENTED FOR REVIEW IN THIS COURT.**

**A. The Question Argued in the Petition Herein Is Not Involved in This Case.**

It is an elementary rule that the exclusive power to enforce a charitable trust is vested in the Attorney General, and that a member of the public has no standing, as such, to sue for the enforcement of the trust. In Professor Scott's work "The Law of Trusts," 1956 Ed., Vol. 4, Sec. 391, page 2760, the author states:

> "On the other hand, a person who has no interest in the performance of the trust, no interest other than as a member of the community, cannot maintain a suit for the enforcement of the trust. (Citing cases.) He may, if he can, induce the Attorney General to bring a suit, * * *. But a third person who has no special interest cannot himself maintain the suit. If a third person were permitted to sue as a matter of right it would be possible to subject the charity to harassing litigation. Thus where a testator left his estate in trust to establish and maintain an art museum in a City, a resident and taxpayer of the City cannot maintain a suit to enforce the trust." (Citing *Dickey v. Volker*, 321 Mo. 235, cert. den. 279 U. S. 839.)

This rule is followed in Illinois. *Art Institute of Chicago v. Castle*, 9 Ill. App. 2d 473; *Peo. ex rel. Courtney v. Wilson*, 327 Ill. App. 231; *Kolin v. Leitch*, 343 Ill. App. 626. Pre-

sumably the application of this rule does not involve any question of due process of law.

The gist of petitioner's argument is that to prevent a citizen from suing to enforce a charitable trust in a case where the trustee and the Attorney General were shown to be acting fraudulently would deprive the citizen of property without due process of law. This issue is not involved in this case, however, and cannot be considered here. Petitioner, in his statement of the "Question Presented" and throughout his petition, incorrectly states the holding below in his present attempt to raise this question.

This suit was an express attempt to make a collateral attack upon final orders of the Circuit Court of Cook County, Illinois, entered in 1933 and 1956 involving the use of the B. F. Ferguson Monument Fund by the Art Institute of Chicago, its trustee. This is a charitable trust. The interest of the public in this trust was represented in the 1933 and 1956 cases by the Attorney General of the State of Illinois. Petitioner sought to avoid the 1933 and 1956 decrees by charging that the 1933 decree was the result of fraud and collusion. (It will be noted that the complaint did not charge that the 1956 decree was fraudulent, however, nor did it show any adequate reason why that decree should not be binding upon petitioner.) Petitioner's charges against the 1933 decree were unsupported by any factual allegations of fraud or collusion. Instead, the charges in the complaint consisted almost entirely of expletives and vituperation such as "fraud and collusion," "unqualified hoax," "collusive and fraudulent actions," "scheme and hoax," and similar words, including the charge that the defendants "perpetrated ethical and cultural genocide upon the plaintiff." The complaint was dismissed by the Superior Court of Cook County, Illinois. The Appellate Court of Illinois affirmed the order of dismissal for reasons set forth in the opinion (Appendix A

of the petition herein), including a holding that there was no sufficient allegation of facts in the complaint to show fraud.

Thus, the courts below have held that plaintiff has not alleged fraud under the rules of pleading and of substantive law applicable to this case. Petitioner has ignored this holding, and frames his entire petition as though an effective allegation of fraud had been made. For example, on p. 9 of the petition, he states:

> "Thus, the Supreme Court of Illinois has sanctioned a rule of law which in effect immunizes both the Attorney General of Illinois and the trustees of a charitable trust from a collateral attack once the trustees have succeeded in procuring a fraudulent decree by which the trustees capture the trust."

This statement has no basis in the holding below, in that it assumes that the courts below have found that the 1933 decree was fraudulent, contrary to the plain statement of the Appellate Court that there was "no sufficient allegation of facts to show fraud."

The question posed by the petition was not involved in the decision below and cannot be considered here.

The case of *Hansberry* v. *Lee*, 311 U. S. 32, on which petitioner relies, does not support petitioner's argument. In that case, this Court held that a state court had deprived persons of due process of law by its adjudication that they were bound by a judgment in an earlier litigation *in personam* in which they were not parties (and had interests contrary to those of the parties to the litigation) and which was not a class suit. In the present case, on the other hand, the state court was considering earlier litigation *in rem* in which the petitioner and other members of the public as a class were represented by the Attorney General. As this Court stated in *Hansberry* v. *Lee*, 311 U. S. 32, at p. 42:

> "It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where * * * the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter."

This doctrine is precisely applicable in the present case, where petitioner and all other members of the public were represented as a matter of law by the Attorney General.

**B. As It Relates to Respondent The Northern Trust Company, the Decision Below Is Supported by Separate Independent Grounds Involving No Federal Question.**

In addition to the foregoing considerations which apply to both respondents, it is clear that no federal question was involved in the holding below with respect to respondent The Northern Trust Company.

This suit was concerned with the use of the B. F. Ferguson Monument Fund, a trust fund consisting of accumulated income held by The Art Institute of Chicago, as trustee. In 1933 and 1956, certain decrees were entered in the Circuit Court of Cook County, Illinois, with respect to that fund. This suit was filed for the express purpose of attacking collaterally the 1933 and 1956 decrees, on the ground that the 1933 decree was the result of fraud. There is no controversy over the facts that:

> (a) The Northern Trust Company is not and never was trustee of the B. F. Ferguson Monument Fund, which is the subject of this suit, and
>
> (b) The Northern Trust Company was not a party to the 1933 or 1956 proceedings.

The separate and limited duties and powers of The Northern Trust Company under the Ferguson will were recognized by the Appellate Court of Illinois in *Art Institute of Chicago* v. *Latham Castle*, 9 Ill. App. 2d 473, which

affirmed the denial of the National Sculpture Society for leave to intervene in Circuit Court case No. 55 C 249, one of the cases attacked by Petitioner in his complaint herein. In holding that The Northern Trust Company was not a necessary party to that proceeding, the Appellate Court said, at page 481:

> "Finally, petitioner maintains that there is a serious question as to whether there is not a necessary party lacking, namely, The Northern Trust Company. The latter is the residuary trustee under the will, which directs that the trustee shall keep intact a permanent trust fund of not less than $1,000,000 and shall, after the payment of certain bequests, annually pay the entire net income arising therefrom to The Art Institute, to be held as the B. F. Ferguson Monument Fund. *When the income payments have been made to the Art Institute, the obligations and duties of the trust company with respect thereto are at an end.* The will provides that the income received by the Art Institute shall be held by it as the B. F. Ferguson Monument Fund and shall be entirely and exclusively used and expended by it under the directions of its Board of Trustees in the erection and maintenance of enduring statuary and monuments. The testamentary trustee is not a necessary party to a suit to enforce the proper use of the funds and it was not necessary that it be made a party." (Emphasis supplied.)

This decision is in conformity with the general rule applicable in cases of this nature. Bogert, "Trusts and Trustees," § 413; *Dillaway* v. *Burton*, 256 Mass. 568, 152 N. E. 13.

These authorities make it clear that The Northern Trust Company had no authority to question the use of the Monument Fund by The Art Institute, its trustee.

The complaint herein contained no charge that The Northern Trust Company had failed to perform its duties under the Ferguson will. The only charges against The

Northern Trust Company are vague charges that it "ratified and condoned" the 1933 proceedings in the Circuit Court. These charges are unsupported by any allegation of fact whatever.

Since the Appellate Court of Illinois held that petitioner's entire complaint was without merit, it was unnecessary for the Court to discuss the special position of The Northern Trust Company. Nevertheless, the decision of the Appellate Court affirming the order dismissing the complaint was proper, with respect to The Northern Trust Company, for the special reasons set forth above, independent of the merits of petitioner's case against The Art Institute. Thus, the decision below involved no federal question with respect to this respondent, and cannot be reviewed here.

## II.

## PETITIONER HAS WAIVED ALL CONSTITUTIONAL QUESTIONS BY APPEALING TO THE APPELLATE COURT OF ILLINOIS, RATHER THAN TO THE ILLINOIS SUPREME COURT, AND HAS NO STANDING TO SEEK REVIEW IN THIS COURT.

The Civil Practice Act of Illinois provides that:

> "Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved." Ill. Rev. Stats., ch. 110, § 75.

As construed by the courts of Illinois, this rule means that although a constitutional question may have been raised by the pleadings, or on trial, when the appellant takes his case to the Appellate Court, he thereby waives any constitutional question. This rule applies even though the constitutional question be one involving the Constitution of the United States. *City of Edwardsville* v. *Central Union Telephone Company*, 302 Ill. 362 (1922).

See also *People* v. *Terrill*, 362 Ill. 61 (1935); *People* v. *Rosenthal*, 370 Ill. 244 (1938) and *People* v. *Parker*, 396 Ill. 583 (1947).

This Court considered the effect of a waiver under this provision of Illinois law in *Central Union Co.* v. *Edwardsville*, 269 U. S. 190 (1925), and held that the doctrine of waiver under Illinois law was fair and reasonable and binding upon the Supreme Court of the United States. The Court said, in an opinion written by Mr. Chief Justice Taft, at p. 194:

> "But counsel for plaintiff in error insist that it is for this Court to determine finally whether a litigant in a state court has waived his federal right, citing *Davis* v. *O'Hara*, 266 U. S. 314; *Davis* v. *Wechsler*, 263 U. S. 22; *American Railway Co.* v. *Levee*, 263 U. S. 19; *Truax* v. *Corrigan*, 257 U. S. 312, 324; *Union Pacific Railway Company* v. *Public Service Commission*, 248 U. S. 67. But there is nothing in these cases which justifies this Court in ignoring or setting aside a required form of practice under the appellate statutes of the State by which federal constitutional rights, as well as state constitutional rights, may be asserted in the Supreme Court of the State or be held to be waived, if the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by that court. We said in *John* v. *Paullin*, 231 U. S. 583, 585: 'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law,'—and many cases are there cited.
>
> "It sems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the

other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court."

This Court expressly adhered to the *Central Union* decision in *Parker* v. *Illinois*, 333 U. S. 571 (1947). The opinion of the Court, written by Mr. Justice Douglas, recited that under Illinois law

"The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

These cases leave no doubt but that petitioner has waived all constitutional questions under the rules of Illinois appellate procedure, and having done so, has no standing to seek certiorari in this Court.

## CONCLUSION.

It is respectfully submitted that the decision below is adequately supported by independent grounds which do not involve the determination of a federal question; that the question argued in the petition is not involved in this case; that petitioner has waived all constitutional questions; and that for these reasons the writ of certiorari should be denied.

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September 17, 1958.